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STATE FOR EB/TPP, WHA/EPSC, WHA/CEN
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E.O. 12958: N/A
TAGS: ETRD ECON EFIN EINV NU
SUBJECT: NICARAGUA: POST'S INPUT FOR THE 2007 NATIONAL
TRADE ESTIMATE REPORT

REF: SECSTATE 136315

¶1. This cable transmits post's input for the 2007 National Trade Estimate Report on Nicaragua. Per reftel instructions, post transmitted this information via e-mail on November 7 to USTR/Gereffi and Blue, STATE/WHA/CEN/Schiffer and Kopolow, and STATE/EB/TPP/Clarkson and Lampron.

TRADE SUMMARY

Tariffs

¶2. (U) In 2002 and 2003, Nicaragua completed implementation of most of a broad package of tariff reductions that had been approved in 1997. In those same years, two tax reform bills introduced additional tariff changes. In 2005, additional reforms were introduced. The overall thrust of these changes in both legislation and practice has been to reduce tariffs (although there have been a few increases), eliminate non-tariff barriers, and greatly limit the discretion of government officials to waive the application of tariffs. The reform process has been in accordance with the reduction and harmonization of a common external tariff among members of the Central American Common Market (CACM) to between 0% and 15% on most items. Nicaragua imposes regular import duties of 10% or 15% on many final consumer goods, a duty of 0-5% on most primary goods, and a duty of 5-10% on intermediate goods from outside CACM that compete with products produced by CACM countries. The tariff is assessed on the cost, insurance, and freight (CIF) value of a good.

¶3. (U) Under CAFTA-DR, about 80% of U.S. industrial and commercial goods may enter Nicaragua duty-free, with remaining tariffs phased out over 10 years. Nearly all textile and apparel goods that meet the CAFTA-DR's rules of origin are duty-free and quota-free. A small number of protected agricultural commodities, notably rice and chicken parts, have particularly high tariff rates. Processed rice faces tariffs as high as 60%, down from 103.5% in 2002. Certain chicken parts face a tariff of 170%. Tariffs on corn range from 10% to 15%. Tariffs on cheese and certain other dairy products from countries outside the CACM region are subject to a common external tariff of 40%. Under CAFTA-DR, Nicaragua will eliminate tariffs on nearly all agricultural products within 15 years, including its tariffs on rice and yellow corn. Nicaragua will eliminate its tariffs on chicken

leg quarters within 18 years and on dairy products within 20 years. For the most sensitive products, tariff rate quotas permit some immediate duty-free access for specified quantities during the tariff phase-out period, which will expand over time. Nicaragua will liberalize trade in white corn through expansion of a tariff rate quota.

Non-Tariff Measures

¶4. (U) A "selective consumption tax" on luxury items is levied on a limited number of items. The tax is generally lower than 15%, with a few exceptions. The tax is not applied exclusively to imports, however, domestic goods are taxed according to the manufacturer's price while imports are taxed according CIF value. Alcoholic beverages and tobacco products are taxed according to the price charged to the retailer. The selective consumption tax on soft drinks is 9%.

STANDARDS, TESTING, LABELING, AND CERTIFICATION

¶5. (U) Consumer products must be labeled in Spanish, except for products destined for the Atlantic region, where English may be required. Importers may translate labels into Spanish. The Government of Nicaragua accepts a sticker with a Spanish translation.

¶6. (U) When the United States and Central America launched free trade agreement negotiations, they initiated a working group on sanitary/phytosanitary barriers to agricultural trade to facilitate market access. As a result of the work of this group, Nicaragua committed to resolve specific measures affecting U.S. exports to Nicaragua. On February 18, 2005, the President of Nicaragua signed a decree recognizing the equivalency of foreign meat and poultry inspection systems. After auditing the U.S. meat and poultry inspection system, the Government of Nicaragua granted equivalency to the United States. U.S. meat and poultry exports from any federally inspected establishment are now allowed into Nicaragua.

¶7. (U) The U.S. Animal and Plant Health Inspection Service has negotiated protocols with Nicaragua for the importation of U.S. rice, wheat, yellow corn, and seed potatoes. All packaged food products must be registered with the Ministry of Development, Industry and Trade. If a product is imported in bulk and packaged in Nicaragua, a phyto/zoosanitary certificate is required from the country of origin and from the Nicaraguan Ministry of Health. A phyto/zoosanitary certificate issued by Nicaragua is not required for products packaged in the United States.

¶8. (U) Under CAFTA-DR, Nicaragua commits to abide by the terms of the WTO's Import Licensing Agreement. Import licenses are required to import beverage alcohol, and all brands of alcoholic beverages must be registered annually with the Ministry of Health. U.S. industry has expressed concern about Nicaragua's proposed standards for rum and "agua ardiente." However, Central American countries, including Nicaragua, are in the process of developing common standards for several products, including distilled spirits, which could serve to increase market access and facilitate trade for U.S. producers. Nicaragua committed under CAFTA-DR to explicitly recognize Bourbon and Tennessee Whiskey as distinct products of the United States.

¶9. (U) Law 291 regulates the importation of genetically modified organisms (GMOs). The law was approved in 1998 and modified in 2003 to require that GMOs undergo a risk analysis prior to importation. The risk analysis must be performed by the Commission on Risk Analysis for Genetically Modified Organisms (CONARGEN), which makes a recommendation concerning importation to the Minister of Agriculture and Forestry, who then issues a final decision. CONARGEN is comprised of officials from the Ministry of Agriculture and Forestry, the Nicaraguan Institute for Agricultural Technology, the Ministry of Environment and Natural Resources, the Ministry

of Health, the National Autonomous University of Nicaragua in Leon, the National Agrarian University, and the Central American University in Managua. After reaching consensus with anti-biotechnology organizations in 2005, the government submitted a compromise science-based biotechnology bill to the National Assembly for approval. As of November 2006, passage was still pending.

¶10. (U) Nicaragua is in the process of implementing the provisions of the Cartagena Protocol, of which it is a signatory. As part of the process, in 2005 the GON began to require notifications and a risk analyses on the possible import of living modified organisms (LMOs). CONARGEN has conducted risk analyses on all genetic events authorized by the United States for yellow corn destined for processing and for animal feed. Nicaragua and the United States signed an agreement on the transboundary movement of LMOs destined for food, feed, or processing that entered into force on February 18, 2005. The agreement articulates a practical definition for LMO and non-LMO shipments for purposes of applying the "may contain" documentation requirement, and recognizes that non-LMO shipments must be defined in a sales contract as having 95% or greater non-LMO content.

GOVERNMENT PROCUREMENT

¶11. (U) Nicaragua's procurement law applies to all branches of government as well as to the autonomous regional governments, municipalities, universities, and other institutions that receive government funds or where the state is a shareholder. It sets general standards and procedures regulating public acquisition, leasing, construction, and contract of services. Nicaragua is not party to the WTO Agreement on Government Procurement.

¶12. (U) CAFTA-DR requires fair and transparent procurement procedures, including advance notice of purchases and timely and effective bid review procedures for procurement covered by the agreement. U.S. suppliers may bid on the same basis as Nicaraguan suppliers on procurements by most Nicaraguan government entities, including key ministries and state-owned enterprises. In the past, some suppliers have complained about inadequate notification of pending procurements. Nicaragua is currently implementing a computer-based system to make the bidding process more transparency and efficient. The anti-corruption provisions in CAFTA-DR require each government to ensure that bribery in matters affecting trade and investment, including government procurement, is treated as a criminal offense or subject to comparable penalties under law.

EXPORT SUBSIDIES

¶13. (U) Nicaragua does not provide export financing. However, all exporters receive tax benefit certificates equivalent to 1.5% of the FOB port of exit value of the exported goods. Foreign inputs for Nicaraguan export goods from the country's free trade zones enter duty-free and are exempt from value-added tax. Under the CAFTA-DR, Nicaragua may not adopt new duty waivers or expand existing duty waivers conditioned on the fulfillment of a performance requirement (e.g., the exportation of a given level or percentage of goods). Nicaragua may maintain existing duty waiver measures provided such measures are consistent with its WTO obligations.

INTELLECTUAL PROPERTY RIGHTS PROTECTION

¶14. (U) In March 2006, Nicaragua strengthened its legal framework for protection of intellectual property rights (IPR) with the passage of five new laws in preparation for the implementation of CAFTA-DR. The laws provide stronger deterrence against piracy and counterfeiting by criminalizing end user piracy and requiring Nicaragua to authorize the seizure, forfeiture, and destruction of counterfeit and

pirated goods and the equipment used to produce them. They also mandate the payment of statutory and actual damages for copyright and trademark infringement, to ensure that monetary damages can be awarded even when losses associated with a violation are difficult to assign.

¶15. (U) Although historically IPR enforcement has been weak, U.S. Government and industry are working with the Nicaraguan government to provide training to improve enforcement. In an April 2006 raid, police took custody of 13,000 pirated CDs and DVDs, but made no arrests.
In October 2006, the government scored its first prosecutorial victory when a court convicted a local vendor of selling 400 pirated videos. The vendor was fined $1,500 and sentenced to two years in prison. It was a short-lived victory as weeks later the conviction was overturned by an appeals court. In coming months, the government plans to try its first copyright and trademark infringement case under the new IPR law.

¶16. (U) In the past, a lack of regulation establishing procedures to guarantee the protection of pharmaceutical and agricultural product test data against unfair commercial use was a serious concern. CAFTA-DR now requires Nicaragua to protect undisclosed test data submitted for the purpose of product marketing approval of pharmaceutical and agricultural chemical products against disclosure and unfair commercial use.

SERVICES BARRIERS

Financial Services

¶17. (U) Nicaragua has ratified its commitments under the 1997 WTO Financial Services Agreement. Its commitments cover most banking services, including the acceptance of deposits, lending, leasing, guarantees, and foreign exchange. However, they do not cover the management of assets or securities. Nicaragua allows foreign banks to operate either as wholly owned subsidiaries or as branches. CAFTA-DR ensures U.S. financial service suppliers have full rights to establish subsidiaries, joint ventures, or branches for banks.

¶18. (U) The country's banking system is now stable after having undergone severe restructuring several years ago. In 2005, as part of the Poverty Reduction and Growth Facility agreement with the IMF, Nicaragua further strengthened the financial sector through reforms to its banking laws, the Superintendent of Banks and Other Financial Institutions, and the Guarantee of Deposits in Institutions of the Financial System. In recent years, U.S. and foreign banks have begun to re-enter the market. In 2005, GE Financial Services acquired 49.99% stake in the Bank of Central America, a Nicaraguan-owned regional bank. In October 2006, Citigroup announced, subject to regulatory approval, the acquisition of Grupo Financiero Uno, the largest credit card issuer in Central America with a distribution network of 75 branches. Other foreign banks have also opened offices, such as Banco del Istmo, a member of the Panamanian Grupo Banistmo currently in the process of being acquired by Hong Kong and Shanghai Banking Corporation. Additionally, Banco ProCredit (formerly Financiera ProCredit) and FINDESA, both microfinance institutions, have been authorized to operate as commercial banks.

¶19. (U) The insurance sector is open to private sector participation. Several private insurance companies compete with the government-owned firm INISER. Under CAFTA-DR, U.S. insurance suppliers have full rights to establish subsidiaries, joint ventures, and/or branches. Nicaragua allows U.S.-based firms to supply insurance on a cross-border basis, including reinsurance, reinsurance brokerage, as well as marine, aviation, and transport insurance, in addition to other insurance services. Further, Nicaragua accords substantial market access in services across their entire services regime, subject to very few exceptions. No U.S. or

other foreign insurance company has yet entered the Nicaraguan market.

Telecommunications

¶20. (U) Under CAFTA-DR, Nicaragua opened its telecommunications sector to U.S. investors, service providers, and suppliers. All exports, including telecommunications equipment, receive duty-free treatment.

¶21. (U) The telecommunications sector is fully privatized. TELCOR, the regulatory entity, has generally encouraged competition in its licensing and regulatory practices. Enitel, the former state telephone company, is now 99.03% owned by the Mexican telecommunications company America M"vil. America Movil also obtained a license to operate the cellular company Alo PCS. In 2004, America Movil merged Enitel Movil with Sercom Nicaragua, and BellSouth sold its Nicaraguan unit TCN BellSouth to Telefonica Moviles, a Spanish company. As a result, the mobile industry in Nicaragua is now served by only two nationwide operators: Telefonica Moviles and America Movil (now Claro). Enitel controls switching for all cellular service, and therefore may exercise leverage over companies seeking interconnection.

¶22. (U) At the end of 2004, Enitel unilaterally imposed a 100% increase in termination rates for calls sent to wireless networks and blocked traffic to such networks when carriers refused to pay the increase. TELCOR was not effective in requiring Enitel to justify the increase. The opening of the fixed-line and international telephony markets was delayed when the National Assembly created the Office of the Superintendent of Public Services (SISEP) to regulate electricity, water, and telecommunications and the role of TELCOR was obscured. Institutional deadlock was averted when the formation of SISEP was delayed until January 2007. Fixed-line and telephony markets are now open. However, duplicate appointments to TELCOR by the executive and legislative branches have resulted in a continuing leadership stalemate for the regulatory authority.

¶23. (U) The Law on Promotion of National Artistic Expression and on Protection of Nicaraguan Artists (Law no. 215, National Gazette 134, July 17, 1996) requires that foreign production companies contribute 5% of total production costs to a local cultural fund. In addition, the law requires that 10% of the technical, creative, and/or artistic staff must be hired locally. Under CAFTA-DR, Nicaragua does not require U.S. film productions to contribute to the cultural fund or hire locally.

INVESTMENT BARRIERS

¶24. (U) Under CAFTA-DR, all forms of investment are protected, including enterprises, debt, contracts, concessions, and intellectual property. U.S. investors enjoy in almost all circumstances the right to establish, acquire, and/or operate businesses in Nicaragua on an equal footing with local investors. Among the rights afforded to U.S. investors are due process protections and the right to receive a fair market value for property in the event of expropriation. Investor rights are backed by an effective, impartial procedure for dispute settlement that is fully transparent. Submissions to dispute panels and panel hearings will be open to the public, and interested parties may submit their views.

¶25. (U) Poorly enforced real property rights constitute a serious barrier to investment in Nicaragua. In the 1980s, the Sandinista government confiscated nearly 30,000 properties. Since 1990, many thousands of individuals have filed claims for the return of real property or compensation. A weak registration system has led to conflicting claims that can delay investment. Property claimants can sue for the return of property, but the legal system favors current

occupants. Most claimants seek compensation through the low-interest bonds issued by the Government. As of November 2006, the Nicaraguan government had settled nearly 4500 U.S. citizen claims. Fewer than 700 embassy-registered U.S. claims were outstanding. Many valuable properties remain in the hands of the government or private parties, including former Sandinista government officials and military officers. The United States continues to urge the Nicaraguan government to resolve outstanding claims.

¶26. (U) Reforms introduced in 2005 halted exemptions on the taxation of certain imported items, including taxes on a list of luxury products and materials considered necessary to develop tourism. The Ministry of Tourism and the private sector have been lobbying the National Assembly to re-establish these incentives and to approve a new law that would allow tourism companies to issue investment bonds.

¶27. (U) A new environmental protection law entered into force on May 20, 2006 which is much more rigid than previous laws, especially since it combines fines ranging between $1,000 and $50,000 with actual jail time for lawbreakers and penalties for accomplices. The law requires that any project affecting the environment undergo an environmental impact assessment and that investors provide some sort of financial guaranty, in an amount determined by the Ministry of Environment and Natural resources, to cover the risk of environmental damage.

¶28. (U) In June 2006, the National Assembly approved a new law on forest management that prohibits the export of any species of wood from Nicaragua for the next ten years that has not undergone transformation into an intermediary or final product. The law also prohibits for ten years the harvest of six species of wood: mahogany, cedar, pine, pochote, mangle, and ceibo. An exception is made for pine harvested in the departments of Nueva Segovia, Jinotega, and the Autonomous Region of the North Atlantic.

Arbitration

¶29. (U) The Nicaraguan government accepts binding international arbitration of investment disputes between foreign investors and the state. Nicaragua is party to both the Inter-American Convention on Arbitration and the New York Convention on Arbitration, and is a member of the International Center for the Settlement of Investment Disputes (ICSID). Nicaragua signed the 1958 New York Convention on the recognition and enforcement of foreign arbitration awards and ratified it in 2003. In 2005, the National Assembly approved an arbitration law based on the UN Model Law on International Commercial Arbitration. The law allows for arbitration between private parties, however, parties may still submit a motion to the Supreme Court seeking to nullify an arbiter's decision. In May 2006, the Nicaraguan Chamber of Commerce inaugurated Nicaragua's first center for mediation and arbitration. Nicaraguan businesses may choose from a list of national and international mediators to deal with a dispute.

ELECTRONIC COMMERCE

¶30. (U) CAFTA-DR includes provisions on electronic commerce that reflect its importance to global trade, including the provision of services by electronic means. Under CAFTA-DR, Nicaragua provides non-discriminatory treatment to U.S. digital products and services, does not impose customs duties on digital products, and cooperates with the United States in policy areas related to electronic commerce.

OTHER BARRIERS

¶31. (U) The anti-corruption provisions in the CAFTA-DR require each government to ensure that bribery in matters affecting trade and investment is treated as a criminal

offense, or is subject to comparable penalties under law. However, voices within and outside of Nicaragua have raised concerns that Nicaragua's legal system is weak, cumbersome, and lacks independence. Many members of the judiciary, including those at high levels, are widely believed to be corrupt or subject to outside political pressures. Enforcement of court orders is uncertain and sometimes subject to non-judicial considerations. Courts have granted a writ of shelter (called an "amparo") to protect criminal suspects of white collar fraud by enjoining official investigatory and enforcement actions almost indefinitely. Foreign investors are not specifically targeted, but are often at a disadvantage in disputes against nationals with political connections. Recognizing Nicaragua's reputation for having problems with corruption, President Bola$os made anti-corruption a centerpiece of his administration's domestic policy. This effort greatly contributed to Nicaragua's selection in 2004 as a country eligible for Millennium Challenge Account (MCA) assistance. Nicaragua's MCA program requires the country to maintain progress on eligibility criteria, particularly in the areas of controlling corruption, improving government effectiveness, and assuring political/civil liberties.

Law 364

¶32. (U) U.S. multinational firms and the U.S. Chamber of Commerce have expressed concern regarding Nicaraguan Law 364, enacted in October 2000 and published in January 2001. Law 364 retroactively imposes liabilities on foreign companies that manufactured or used the chemical pesticide DBCP in Nicaragua. DBCP was banned in the United States after the Environmental Protection Agency cancelled its certificate for use (with exceptions) in 1979. U.S. multinationals have expressed concern that the law and its application under Nicaragua's judicial system lack due process, transparency, and fundamental fairness. In particular, the law allows for retroactive application of no-fault liability related to a specific product, waiver of the statute of limitations, irrefutable presumption of causality, truncated judicial proceedings, imposition of a $100,000 non-refundable bond per defendant as a condition for firms to put up a defense in court, escrow requirements of approximately $20 million earmarked for payment of awards, and minimum liabilities as liquidated damages (ranging from $25,000 to $100,000.) In January 2006, the National Assembly placed an embargo on the trademark rights of an American multinational because of its involvement in the production of this pesticide. Some plaintiffs seek to lay claim to U.S. company assets in other countries.
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